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Nos. 80-1640 and 80-1656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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Respondents' opposition to our suggestion of mootness warrants a very brief reply.

1. Contrary to respondents' contentions (Opp. 7-8), neither the newly amended Atomic Energy Act nor its legislative history reflects approval of the decision of the court of appeals. On the contrary, as explained in our suggestion of mootness, and as respondents elsewhere acknowledge (Opp. 9, 17), the Amendments make clear that the Commission may dispense with a prior hearing when an operating license amendment is determined to entail "no significant hazards consideration." Respondent stresses (Opp. 7-

13) that the new legislation refines in various respects the rule previously advocated by the Commission as a matter of interpretation of the pre-existing language of Section 189(a) of the Atomic Energy Act. But that does not alter the fact that the enactment of this legislation eliminates any remaining controversy as to the proper interpretation of the former provisions of law, and therefore renders this case moot. __/ Contrary to respondents' assertion (Opp. 24), there is ample precedent for issuance of a Munsingwear order when a controversy is overtaken by amendatory legislation. See, e.g., Chicago Board Options Exchange v. Board of Trade of Chicago, Nos. 82-327 & 82-526 (Nov. 29, 1982); State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981).

2. Contrary to respondents' suggestion, there is no occasion for this Court either to "apply the new amendments to the facts of this case" (Opp. 16) or to remand this case to the court of appeals (Opp. 18).

a. There is no reason for this Court to apply the new amendments to the facts of this case. The question whether the Commission's orders would have been upheld under the amended statute is entirely academic. No meaningful relief can now be awarded respecting the Commission's orders. No jurisdiction exists to enter such an advisory opinion.

__/ While the amended Section 189(a) does not in all respects track the Commission's contentions respecting its predecessor, the differences are the result of refinements and distinctions that are legislative in nature and would have been beyond the power of the courts to establish. In any event the amendments to Section 189(a) plainly do not adopt the court of appeals' view on the question presented: the necessity of a prior hearing. Plainly, the enactment of the "Sholly" Amendment to Section 189(a) (see H.R. Rep. No. 97-884, 97th Cong., 2d Sess. 36 (1982)) does not reflect the view that Sholly was rightly decided. See also 128 Cong. Rec. S 15314 (daily ed. Dec. 16, 1982) (remarks on the conference report of Senate Manager Senator Simpson: "The Sholly provision corrects what most all of us have viewed as an erroneous judicial interpretation of the hearing requirement for 'no significant hazards consideration' amendments by providing that no hearings in advance of these types of determinations are required"); see also 128 Cong. Rec. S 15315 (daily ed. Dec. 16, 1982) (remarks of Sen. Domenici).

This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Pet. App. 9a). As indicated in the suggestion of mootness (page 4), the recent amendments to Section 189(a) eliminate all possibility that that statutory question will reoccur. Respondent's observation (Opp. 15) that the NRC may continue to avail itself of its authority to make its "no significant hazards consideration" amendments immediately effective misses the point. The legal questions that could be raised should the Commission employ that authority in the future would be entirely different from those raised heretofore in this case. Moreover, the academic question whether the Commisison's orders in this case complied with the subsequently amended Section 189(a) would shed no light on the issues that might arise in further litigation. Thus, there is no longer any issue that is capable of repetition, yet likely to evade review.

b. There is no reason to remand this case to the court of appeals either for exploration of the validity (under the former statute or the present statute) of the Commission's "no significant hazards" finding in this case (Opp. 18-19), or for the exploration of a constitutional question that respondent intimates to be present (Opp. 5, 12). Plainly, the question whether the no significant hazards determination in this case was proper is not capable of repetition, and it does not "continue[] to affect a present interest." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-126 (1974). Accordingly, that question is moot. __/

__/ The court of appeals did not suggest that the validity of the no significant hazards determination escaped mootness under the recurring question doctrine; the court below merely held that the separate question of interpretation of Section 189(a) was not moot.

Contrary to the respondent's suggestion (Opp. 5, 12), the issue in the court of appeals was never of constitutional dimensions. Any constitutional challenge respondents might wish to mount to the newly amended statute will have to await the advent of a concrete controversy.

3. Respondents do not quarrel with our submission that this Court should not render any decision in this case and that the controversy has been robbed of all vitality (see Opp. 19-23). They nonetheless seek to avoid vacatur of the judgment of the court of appeals suggesting that our petition should merely be dismissed (Opp. 24). No precedent is cited for that disposition. And it would be inappropriate to allow the judgment of the court of appeals to stand because the Court has determined that further review is warranted in this case, but intervening circumstances have deprived petitioners of an opportunity for that review. Accordingly, this Court should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while awaiting this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the petitions for review as moot. See, e.g., Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979); United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).

The private petitioners have authorized us to state that they join in this submission.

For the reasons stated, and those previously stated in our suggestion of mootness, it is respectfully submitted that the judgment of the court of appeals should be vacated, and the case remanded with instructions to dismiss the petitions for review as moot.

REX E. LEE
Solicitor General

FEBRUARY 1983